UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff, - against - UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	:	Index No. 05 Civ. 3941 (JSR)

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Through this lawsuit the Associated Press ("AP") seeks to enforce the public's right to inspect the records of tribunals convened by the Department of Defense ("DOD") to determine whether some 558 individuals rounded up since 2002 in Afghanistan, Gambia, Bosnia, Thailand and elsewhere are properly designated "enemy combatants." The "enemy combatant" designation carries grave consequences—DOD says such individuals may be confined indefinitely at an isolated Naval Base in Guantanamo Bay, Cuba ("Guantanamo"), without any charges ever being lodged against them and without even the rights afforded to prisoners of war by the Geneva Conventions. The AP submits that the citizens of the United States are entitled to understand the manner in which DOD exercises the vast power it claims, and against whom.

Since this lawsuit was filed, DOD has turned over records from 369 tribunals. The issue presented by defendant's motion for summary judgment is whether DOD properly invoked Exemption 6 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(6), to withhold from these official records of military tribunals all "identifying information," broadly defined, of any detainee, any witness, and virtually anyone even mentioned on the record. The information withheld includes not only names, ages, nationalities, and addresses, but also references to jobs, places, events, political and religious affiliations and any other information that could arguably serve to identify a detainee.

DOD does not assert national security, law enforcement or any other exemption for withholding this information. It claims only that the release of "identifying information" would invade the privacy of the detainees and could place them or their families at risk, so that the information may be withheld under FOIA's Exemption 6. That exemption allows "personnel and medical files and similar files" to be withheld from public disclosure when the release of information about an individual would constitute a "clearly unwarranted invasion of personal privacy." This exemption, the Supreme Court has said, allows personal information to be withheld when it would not "shed any light on the conduct of any Government agency." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

As demonstrated below, Exemption 6 has no proper application to information presented to a tribunal convened to decide whether an individual will be held virtually *incommunicado*, without charge, for an indeterminate term. Those arrested and jailed by the government have a diminished expectation of privacy to start with, and broadly withholding "identifying information" contained in the records of a tribunal effectively defeats the ability of the public to exercise democratic oversight of the actions of government. The protection for personal information under Exemption 6 does not provide DOD with a shield against disclosure of information that would illuminate its own conduct, particularly when, as here, substantial allegations of mistake and misconduct have been made against DOD.

STATEMENT OF FACTS

The relevant facts are set forth more fully in the accompanying declaration of AP's London Bureau Chief Paisley Dodd, and summarized here only in brief.

A. Background of this Dispute

In response to the attacks of September 11, 2001, the United States government captured hundreds of "enemy combatants" during military operations in Afghanistan against al-Qaeda and the Taliban regime. In addition to belligerents captured during battle in Afghanistan, individuals were also captured by the U.S. government in diverse locations such as Gambia, Zambia, Bosnia, and Thailand. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446 (D.D.C. 2005)

("*Detainee Cases*"). These detainees were identified as "enemy combatants" based on the government's conclusion that they have ties to al-Qaeda or other terrorist organizations. *Id.*

Since January 2002, about 750 of these detainees have been housed at the Naval Base at Guantanamo Bay, Cuba. More than 200 detainees originally sent to Guantanamo have reportedly been transferred out—about 167 apparently released outright and 67 handed over to other governments. *See* Dodds Dec. Ex. A. Some 520 detainees remain confined there today, more than three years later, even though they are charged with no crimes. *Id.*

DOD asserts that "enemy combatants" may be held indefinitely until the end of the war on terrorism and that they are entitled to virtually no legal rights under U.S. law or the Geneva Conventions. *See Detainee Cases*, 355 F. Supp. 2d at 447. Many detainees and their governments have protested DOD's designation of them as "enemy combatants," and objected strenuously to various actions allegedly taken by military officials at Guantanamo. *See, e.g.*, Scott Higham, et al., *Guantanamo – A Holding Cell In War On Terror*, Wash. Post, May 2, 2004, at A1; Bob Drogin, *No Leaders of Al Qaeda Found at Guantanamo*, L.A. Times, Aug. 18, 2002, at 1. Released detainees, human rights organizations and even military officers and FBI agents who have worked at Guantanamo, have questioned the treatment of detainees and the conditions under which they are being held. *See, e.g.*, *Detainee Cases*, 355 F. Supp. 2d at 474 (recounting FBI agent's allegations of detainee mistreatment); Neal A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantanamo Bay*, N.Y. Times, May 1, 2005, at A1.

There is little the press or the public can do to investigate these allegations or to evaluate DOD's conduct, because DOD has refused to identify the detainees. Only the identities of those detainees who have filed habeas corpus petitions challenging their detention have been confirmed by DOD. Declaration of Karen Hecker ("Hecker Dec.") ¶ 6 n.1. DOD's refusal to identify the detainees has been widely condemned as a form of secret detention—a practice virtually unprecedented in our history.[1]

Detainees at Guantanamo and elsewhere challenged the process by which they were designated enemy combatants and the legality of their imprisonment by the United States. Ultimately, in *Rasul v. Bush*, 124 S. Ct. 2686 (2004) and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Supreme Court ordered, among other things, that U.S. courts have jurisdiction to hear challenges to the legality of detention of foreign nationals being held at Guantanamo, *id.* at 2634, and that detainees have the right to a determination by an impartial decision maker of their status as enemy combatants, *see Rasul*, 124 S. Ct. at 2698.[2]

In response to the Supreme Court's rulings, DOD promptly announced the creation of a "Combatant Status Review Tribunal" ("CSRT" or "Tribunal") to serve as a "forum for detainees to contest their status as enemy combatants." Dodds Dec. Ex. B. That same day, Deputy Secretary of Defense Paul Wolfowitz issued a memorandum defining the term "enemy combatant" for the first time. Under DOD's definition, "enemy combatant" means an individual who "was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Hecker Dec. Ex. J. From July 2004 through January 2005, a reported total of 558 tribunals were convened, of which 38 declared that the detainee failed to meet this definition of "enemy combatant." *See* Dodds Dec. Ex. F.

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[1] *See, e.g.*, Editorial, *Land of Liberty*, Balt. Sun, Mar. 21, 2003 at 22A (urging DOD to identify the detainees); *Ending Secret Detentions*, report by Human Rights First (formerly Lawyers Committee for Human Rights), issued June 2004; *Lawfulness of detentions by the United States in Guantanamo Bay*, Resolution 1433 of the Council of Europe, approved Apr. 26, 2005 (urging the U.S. "to cease immediately the practice of secret detentions").

[2] Following *Rasul* and *Hamdi*, many more detainees brought habeas corpus actions challenging their detention and their status as enemy combatants. According to DOD, approximately 210 Guantanamo detainees have filed habeas claims. *See* Hecker Dec. ¶ 9. In those cases, the government continues to maintain, despite the Supreme Court's decisions, that "the detainees do not hold any . . . substantive rights." *Detainee Cases*, 355 F. Supp. 2d at 454.

While DOD announced that its plan was "to have open hearings" for the Tribunals, *id.* ¶12, in practice DOD made it difficult for journalists to attend many of the hearings. DOD regularly conducted hearings on days which reporters were not allowed to be at Guantanamo, scheduled multiple hearings for the same time (even though only one reporter per organization at a time was allowed on the Guantanamo base), and scheduled other proceedings at Guantanamo that conflicted with the CSRTs. *Id.* ¶¶ 13-15. The written records of the hearings are thus, in most cases, the only information the public will be able to acquire about what actually transpired.

Several detainees have since challenged the CSRT process, saying the procedures were inadequate and mistakes often made. On January 31, 2005, the United States District Court for the District of Columbia held that 11 detainees could proceed with their claims that the procedures employed in the CSRT hearings violated rights protected by due process and the Geneva Conventions. *See Detainee Cases*, 355 F. Supp. 2d at 481.

B. AP's FOIA Request and DOD's Response

The CSRTs first began hearings on July 30, 2004. On November 4, 2004, AP submitted to DOD a narrow, clear and easily answered FOIA request seeking information to assist in its reporting on the CSRTs. AP sought expedited release of: (1) transcripts of all testimony given detainees at the CSRT hearings; (2) written statements given to the Tribunals by the detainees; and (3) any documents provided by a detainee to his assigned Personal Representative. Dodds Dec. ¶ 18. Notwithstanding repeated assurances that AP's request was being expedited, and that documents would be forthcoming, DOD did not turn over a single document until after this lawsuit was initiated. *Id.* ¶ 20.

Beginning in May, DOD produced approximately 3900 pages of documents that appear to relate to 369 separate CSRTs. *Id.* Although this number falls well short of the 558 Tribunals that were conducted, DOD asserts that "no documents were being withheld from production based on any FOIA exemption." Hecker Dec. ¶ 3. The documents produced, however, suggest that an unknown number of written statements presented to the Tribunals by the detainees may not yet have been produced. Dodds Dec. ¶ 21 & Ex. G.

DOD also redacted a great deal of information from the documents produced. DOD has described the withheld material as the "names, home locales, nationalities, and other personal information about the Guantanamo detainees and their witnesses." DOD Mem. at 2. DOD says this withheld information also includes addresses, ages, and "other information [that] could be used to identify the detainee or witness," Hecker Dec. ¶ 6, and this apparently includes places, events, acquaintances, and a variety of other vital information that has been removed from the records, *see* Dodds Dec. ¶ 22. According to DOD, information identifying detainees who have filed habeas petitions has not been withheld because their identities have been disclosed in the habeas litigation. Hecker Dec. ¶ 6 n.1.

DOD claims the right to withhold "identifying information" from the public under FOIA's Exemption 6, which permits an agency to withhold "personnel and medical files and similar files" when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). This is the only exception invoked by DOD. Hecker Dec. ¶ 3.

In applying Exemption 6, DOD asserts that disclosure of personal identifying information which could link a specific detainee to particular testimony can be withheld because it could place detainees or their families at risk if "terrorist groups or individuals abroad are displeased by something the detainee said." Hecker Dec. ¶ 9. Recognizing that Exemption 6 requires this privacy interest to be weighed against the public interest in the information, DOD argues that the redacted documents are sufficient to inform the public about how the Tribunals functioned. DOD Mem at 22-25. To the contrary, the withheld information deprives the public a great deal of information that would potentially illuminate the actions of DOD in several important respects. *See* Dodds Dec. ¶¶ 24-33. The information therefore may not properly be withheld under Exemption 6, as will now be demonstrated.

ARGUMENT

I.

DOD'S BEARS A HEAVY BURDEN TO WITHHOLD INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

The purpose of FOIA, the Court of Appeals has only recently reaffirmed, is "to promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed." *Nat'l Council of La Raza v. Dep't of Justice*, -- F.3d --, 2005 WL 1274270, at *4 (2d Cir. May 31, 2005) ("*La Raza*") (internal quotation and citation omitted). The Supreme Court is equally explicit in describing the basic purpose of FOIA: "to ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

The Act accomplishes this goal by adopting "as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies." *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999). "[D]isclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) ("*Rose*"). The Act is broadly conceived because access to information about government is "a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

FOIA requires that each agency of the federal government make its records "promptly available to any person," 5 U.S.C. § 552(a)(3), "unless its documents fall within one of the specific, enumerated exemptions set forth in the Act." *La Raza*, 2005 WL 1274270, at *4. "Consistent with FOIA's purposes, these statutory exemptions are narrowly construed." *Id.*; *see also U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (FOIA "exemptions have been consistently given a narrow compass"). District courts are to review *de novo* all claims of exemption advanced by an agency and, if necessary, examine records *in camera* to determine if the statutory exemptions have properly been invoked. *See, e.g.*, *King v. U.S. Dep't of Justice,* 830 F.2d 210 (D.C. Cir. 1987).

On such judicial review, the agency bears the burden of justifying its decision to withhold any requested information. *See Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). Summary judgment is appropriate in a FOIA case, as in any other, only if the moving party proves that there are no material facts in dispute and it is entitled to judgment as a matter of law. *Halpern*, 181 F.3d at 287-88. To meet this standard, DOD must prove that the specific redactions it has made to the Tribunal records sought by AP are expressly authorized by a FOIA exemption. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1999).

II.
EXEMPTION 6 DOES NOT AUTHORIZE DOD TO WITHHOLD NAMES AND OTHER "IDENTIFYING INFORMATION" CONTAINED IN OFFICIAL RECORDS OF THE TRIBUNALS

The government's suppression of the name of anyone it has detained at Guantanamo is a dramatic departure from the traditional American abhorrence of secret arrests and detentions. The ability to deprive individuals of their liberty is one of government's most awesome powers and, accordingly, one of its most dangerous. Access to basic information about those whom the government has detained is fundamental to the public's ability to exercise effective oversight and restraint on the use of this power. In considering identifying information about those incarcerated by the government, FOIA's concern for "a clearly unwarranted invasion of personal privacy" is far more limited than DOD contends. It cannot be stretched so far as to allow DOD to keep secret indefinitely the names of people it has placed in prison for an indeterminate sentence for unknown reasons. Nor does this exemption allow DOD to withhold information that would shed light on its own possible mistakes and abuses.

A. Nature and Scope of DOD's Authority to Withhold Information Under Exemption 6

Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). The use of the phrase "clearly unwarranted" was a "considered and significant determination" by Congress, passed in the face of vigorous opposition by the executive branch, and thus acts as a significant "limitation" on the exemption. *Rose*, 425 U.S. at 378 & n.16; *see also Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971) (language of Exemption 6 "instructs the court to tilt the balance in favor of disclosure"). While all FOIA exemptions are narrowly construed, "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Washington Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982).

Whether a disclosure would amount to a "clearly unwarranted" invasion of personal privacy, turns on "the nature of the requested document" and its relationship to FOIA's core purpose of opening agency action "to the light of public scrutiny." *Reporters Committee*, 489 U.S. at 772 (internal quotations and citation omitted). In *Reporters Committee*, the Supreme Court addressed a FOIA provision in Exemption 7(C) that more broadly exempts from the disclosure of law enforcement files, in particular, information that could constitute an "unwarranted invasion of personal privacy."[3] The Court explained that this exemption allows information to be withheld only when it "reveals little or nothing about an agency's own conduct." *Reporters Committee*, 489 U.S. at 773. On the other hand, even personal information about an individual must be disclosed when that disclosure advances FOIA's purpose of informing citizens about "'what their government is up to'":

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but reveals little or nothing about an agency's own conduct.

Id. (citation omitted)

The same analysis applies to Exemption 6: information may be withheld only when it relates to a private individual and its disclosure would not assist the public in understanding the actions of government.[4] In this case, DOD's redaction of identifying information from the official records of the Combatant Status Review Tribunals is improper given the nature of the records requested and given the restriction in public understanding of what DOD has done as a result of the redactions.

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[3] As a result of differences in statutory language, public disclosure is "more difficult to obtain" when the government relies on Exemption 7(C) rather than Exemption 6. *FLRA v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 509 (2d Cir. 1992). Exemption 7(C) requires only that disclosure "*could reasonably be* expected to constitute an unwarranted invasion of privacy, while Exemption 6 requires a disclosure that "*would* constitute a *clearly* unwarranted invasion of privacy." 5 U.S.C. § 552(b)(7)(C) (emphasis added).

[4] *See U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 496 & n.6 (applying the *Reporters Committee* analysis to Exemption 6, but noting that Exemption 6 is less protective of personal privacy); *Rose*, 425 U.S. at 372 (balancing privacy interests under Exemption 6 against the basic purpose of FOIA "'to open agency action to the light of public scrutiny'") (citation omitted).

B. The "Identifying Information" Cannot Properly Be Withheld Given the Nature of the Records Requested

As a threshold matter, Exemption 6 requires a consideration of the "nature of the requested document." *McDonnell v. United States*, 4 F.3d 1227, 1253 (3d Cir. 1993); *see also Reporters Committee*, 489 U.S. at 772. The exemption was intended to protect individuals from the harm caused by unnecessary disclosure of intimate details contained in "personnel and medical and similar files," such as those maintained by the Veterans Administration or the Selective Service System. *See* H.R. Rep. No. 89-1497 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2428. While this provision has been construed by some courts to extend to any agency record that contains information about an identifiable individual, *see, e.g.*, *Dep't of State v. Washington Post*, 456 U.S. 595, 602 (1982), it should not be construed so broadly as to cover personal information presented, on the record, to a governmental tribunal convened for the express purpose of exercising the power of the State to incarcerate a person.

In similar contexts, courts have recognized the diminished privacy concerns in records relating to a person's arrest or detention:

> [I]ndividuals who are arrested or indicted become persons in whom the public has a legitimate interest, and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest. The lives of these individuals are no longer truly private.

Tennessean Newspaper, Inc. v. Levi, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975) (discussing privacy concerns protected by FOIA); *cf. Paul v. Davis*, 424 U.S. 693, 712-13 (1976) (rejecting constitutional privacy protection for fact of plaintiff's arrest); *Caldarola v. County of Westchester*, 343 F.3d 570, 576 (2d Cir. 2003) (same). Indeed, "if privacy concerns alone were sufficient, the Government could arrest and jail any person accused of a heinous crime and refuse to reveal his or her name to the public." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 105 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).[5]

In this case, the records sought do not simply relate to an arrest, but constitute the official record of the Tribunals that decided the detainees' fates through proceedings comparable in many respects to a judicial proceeding.[6] The CSRTs were adjudicative fact-finding hearings through which a neutral decision-maker determined the liberty of an individual. In such circumstances, regardless which branch of government conducts the hearing, there is a strong public interest in access to the records on which a decision to deprive liberty is based. *Cf. Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 12 (1986) (discussing constitutional presumption of openness to preliminary hearing at which a magistrate determines whether probable cause exists); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694-700 (6th Cir. 2002) (constitutional presumption of access to quasi-judicial deportation hearing).[7] Given the "nature of the requested documents," Exemption 6's protection of privacy does not apply.

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[5] In *Center for National Security Studies*, the D.C. Circuit concluded that the names of individuals detained by the government in the aftermath of September 11 could be withheld under Exemption 7(A) because their release would interfere with law enforcement activity. The Court did not address the balancing that would otherwise be required to withhold the information on grounds of personal privacy under Exemption 7(C). 331 F.3d at 925, 928.

[6] As convened by DOD, each Tribunal was composed of a panel of three commissioned armed forces officers with the power to determine whether an individual held at Guantanamo would remain incarcerated as an "enemy combatant." *See* July 29, 2004 Memorandum from Secretary of the Navy regarding Implementation of Combatant Status Review Tribunal Procedures ("Implementing Mem.") (Hecker Dec. Ex. I). A "Recorder" was appointed to present "such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant." *Id.* §§ C(2), H(4). Detainees had the right to hear the factual bases for their imprisonment, apparently for the first time, but not if that information was "classified." *See id.* §§ F(8), H(4). At the hearing, a detainee had the right to testify on his own behalf, and to present evidence, including witnesses, documents, and written statements, Implementing Mem. §§ F(6, 7). Detainees were not allowed legal counsel, *id.* § F(5), but they were assigned a military officer to serve as their "Personal Representative."

C. Detainee Names and "Identifying Information" Cannot Properly Be Withheld Because Their Release Would Plainly Shed Light on Government Conduct

Invoking Exemption 6 nonetheless, DOD attempts to justify its redactions by arguing that "disclosure of the names and other identifying information about the detainees and their witnesses adds nothing to the public's understanding of DOD's conduct of the Tribunal." DOD Mem. at 22. DOD is incorrect in claiming that the public's ability to evaluate the conduct of the Tribunals is not impaired by the redactions, and it ignores other aspects of DOD's conduct that are shielded from public understanding. Public disclosure of the broad array "identifying information" being withheld by DOD is important if we are to "'hold the governors accountable to the governed.'" *La Raza*, 2005 WL 1274270, at *4 (citation omitted).

DOD is wrong to invoke Exemption 6 to withhold "identifying information" because the information is useful to public understanding of DOD's actions in at least 3 respects: 1) simply knowing *who* DOD has detained is important to a meaningful understanding of what the government is doing; 2) knowing the withheld information is important to understanding the validity of the procedures DOD has followed (procedures which one court has already found to violate U.S. law)[8]; and 3) knowing the withheld facts will shed light on the validity of the allegations of misconduct and abuse that have been aired before the Tribunals. Because withholding the information makes it difficult to assess accusations of governmental mistake and misconduct, the public interest in disclosure outweighs whatever interest in privacy DOD asserts on behalf of the detainees. Information that will "shed light on an agency's performance" of its duties "falls squarely within" the statutory purpose of FOIA and may not properly be withheld. *Reporters Committee*, 489 U.S. at 773.

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[7] Indeed, courts apply the constitutional presumption of openness to non-judicial, administrative proceedings that do not involve liberty issues. *See, e.g.*, *Whiteland Woods, L.P. v. Twp. of West Whitehead*, 193 F.3d 177, 181 (3d Cir. 1999) (municipal planning meeting); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 574 (D. Utah 1985) (mine safety hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987).

[8] *See Detainee Cases*, 355 F. Supp. 2d at 468-72.

1. Illuminating *who* the government has detained.

As this Court has noted, "no free society can long tolerate secret arrests." *In re Application of the United States for Material Witness Warrant*, 214 F. Supp. 2d 356, 364 (S.D.N.Y. 2002). The public has a legitimate interest in knowing the identities of people the government has arrested and detained. Public oversight of the power to imprison individuals deters arbitrary detentions, allows the public to test the government's justifications for detention, and increases public confidence. "Unquestionably, the public's interest in learning the identities of those arrested and detained is essential to verifying whether the Government is operating within the bounds of the law." *Ctr. for Nat'l Sec'y Studies*, 215 F. Supp. 2d at 106.

The historic disdain for secret arrests reflects the traditional American view that the public has an overwhelming interest in knowing who the government has detained. This perspective reaches back before the founding of our nation. As early English settlers were arriving the America, England's infamous Star Chamber was "privately" arresting people and bringing them before the King's Council on "secret information." Sources of Our Liberties 166 n.3 (Richard L. Perry ed. 1959). Recognizing that this system fostered "an arbitrary form of government," in 1641 Parliament abolished the Star Chamber, and English common law subsequently deemed secret arrests "unlawful" and "repugnant." U.S. Dep't of Justice, Criminal Justice Information Policy, Original Records of Entry, NCJ-125626, at 28 (1990).

The drafters of the Constitution thus spoke strongly against secret arrests and detentions. In arguing for ratification in the Federalist Papers, Alexander Hamilton quoted Blackstone's declaration that "confinement of the person, by secretly hurrying him to [jail], where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government" than even depriving a man of his life without due process. Alexander Hamilton, Federalist No. 84 (J. Cooke ed. 1961), quoted in *Hamdi*, 124 S. Ct. at 2661 (Scalia, J., dissenting). Throughout American history, the names of those arrested and detained by the government, even in times of grave danger, have always been made public.[9]

Recognizing the inherent public importance in knowing the names of individuals detained by the government, Congress refused to allow this information to be kept from the public even before FOIA existed. When the District of Columbia attempted to limit access to its arrest records in the 1950s, Congress adopted legislation to prevent just this, "both for the protection of the public against secret arrests and to guard against abuse in any way of the arrest power." H.R. Rep. No. 83-2332 (1954). In enforcing this law 15 years later, the Court of Appeals stressed that secret arrests are "a concept odious to a democratic society." *Morrow v. District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969). Many state courts have similarly relied on their own freedom of information laws to require the disclosure of the names of individuals being detained.[10]

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[9] For example, although the Alien Enemies Act of 1798 gave the president the power to detain or deport "dangerous" aliens during wartime, Justice Washington described such detentions as "public measures." *Lockington v. Smith*, 15 F. Cas. 758, 760 (D. Pa. 1817). And Congress, concerned that President Lincoln had unilaterally declared the writ of habeas corpus suspended and was jailing many civilians on non-criminal grounds, passed a law requiring the secretaries of state and war to provide the federal courts with "a list of all persons" who were detained by the government but were not prisoners of war. Act of Mar. 3, 1863, 12 Stat. 755, ch. 81 § 2 (1863). Even when Nazi saboteurs were apprehended on American soil in 1942, the FBI announced the names of the captured Germans. *See* Jack Goldsmith & Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Comment. 261, 263 (2002).

Simply put, "[a]rrests, indictments, convictions, and sentences are public events," *Reporters Committee*, 489 U.S. at 753, and, for good reason. "[H]istory and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse." *Hamdi*, 124 S. Ct. at 2647. Indeed, in the unique circumstances here, there may be little reason to assume that most detainees would prefer to be held anonymously. Unlike defendants in traditional criminal proceedings, the detainees at Guantanamo have no ability to gather facts to refute the factual allegations against them, and do not have access to the press in order to comment on the nature of their detention. In assessing the interests of the detainees, the Court should consider not only what they have to lose by disclosure, but what they have to gain. *Cf. Lepelletier v. FDIC*, 164 F.3d 37, 46-49 (D.C. Cir. 1999) (disclosing the names of depositors whose funds were held by the FDIC, noting that "analysis under Exemption 6 must include consideration of any interest the individual might have in the release of the information").

2. Illuminating the accuracy and fairness of the government's procedures

Withholding of names and identifying information from the CSRT records is also unjustified, because it interferes with the public's ability to understand whether the conduct of the Tribunals was proper and whether procedures were fairly applied. As reflected in the Dodds

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[10] *See, e.g.*, *Caledonian Record Publ'g Co. v. Walton*, 573 A.2d 296 (Vt. 1990) (arrest records must be disclosed); *State ex rel. Outlet Commc'ns, Inc. v. Lancaster Police Dep't*, 528 N.E.2d 175, 178 (Ohio 1988) (arrest records not confidential); *County of Los Angeles v. Superior Court*, 22 Cal. Rptr. 2d 409, 416 (Cal. Ct. App. 1993) (Public Records Act intended to "continue the common law tradition of contemporaneous disclosure of individualized arrest information in order to prevent secret arrests"); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 180-81, 186-87 (Tex. App. 1975).

Declaration, the withheld information impedes reporting on DOD's conduct and restricts public knowledge of government actions in a number of ways. Dodds Dec. ¶¶ 24-33.

In a typical proceeding, disclosing a detainee's complete identifying information can help "reveal the government's glaring error in detaining the wrong person for an offense," *Detroit Free Press v. Department of Justice*, 73 F.3d 93, 98 (6th Cir. 1996), or result in "previously unidentified witnesses [coming] forward with evidence," *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983); *see also Caldarola*, 343 F.3d at 576 (public knowledge of detainee "enables members of the public who may come forward with additional information relevant to the law enforcement investigation"). These same principles apply to DOD's Tribunals.

Disclosure of identifying information will allow AP to investigate and report on the validity of DOD's claims about specific detainees, whereas preserving the anonymity of detainees and witnesses creates an atmosphere where mistakes can be hidden and criticism stifled. *See Soc'y of Prof'l Journalists*, 616 F. Supp. at 576. The government, as this Court knows from other contexts, is not immune from mistakes that can result in the improper detention of individuals. *See, e.g.*, *In re Application of the United States for Material Witness Warrant*, 214 F. Supp. 2d 356. There is thus "a genuine interest in public disclosure" of otherwise private information when there are allegations of mistake by government agencies. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991). Disclosure serves to reassure the public that proceedings have been conducted fairly. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-73 (1980); *Press-Enter. Co.*, 478 U.S. at 13.

In this case, there are indeed concerns about governmental mistakes. Information about some Tribunals that has been learned through the habeas proceedings raises questions that only underscore the public interest in disclosure of the identifying information DOD is refusing to release. For example, Murat Kurnaz was designated an enemy combatant by a Tribunal last fall. The unclassified evidence DOD presented during the hearing indicated that Kurnaz had been friends in Germany with a person now alleged to be a suicide bomber, and that he traveled to Pakistan to attend the school of an Islamic missionary group alleged to support terrorist organizations. *Detainee Cases*, 355 F. Supp. 2d at 470. Additional evidence subsequently made public revealed that military intelligence and German authorities said that they had no information linking Kurnaz to terrorism. *See* Carol D. Leonnig, *Panel Ignored Evidence on Detainee*, Wash. Post, Mar. 27, 2005, at A1. After reviewing this case, Judge Green was so disturbed by lack of support for the Tribunal's determination that she concluded that the continued detention of Kurnaz "would be a violation of due process." *Detainee Cases*, 355 F. Supp. 2d at 476.

Judge Green found that there may be "similar defects" in the factual presentations relied on to conclude that Jamil El-Banna is an enemy combatant. *Id.* On the basis of DOD's evidence, she found "a serious legal question" about the justification for El-Banna's indefinite detention. *Id.* at 477. Even when the validity of a factual presentation is not questioned, withholding identifying information limits the public's ability to understand or evaluate what has transpired. One transcript, for example, suggests that a detainee with obvious access to significant amounts of money may be a member of the royal family, but his nationality is not disclosed. *See* Dodds Dec. ¶ 26. Knowing this information would obviously shed light on the actions taken by DOD in this detainee's case. In each of these examples, the press has been precluded from its customary role of investigating the government's claims, and the public has been deprived of the opportunity to meaningfully assess the actions taken by DOD.

The public has a clear interest in testing the facts put before a Tribunal and understanding the factual basis for the decision made. The press advances this interest by disseminating and investigating the facts, something reporters do routinely in covering other hearings, but that cannot be done here due to DOD's refusal to release basic information in the record. Dodds Dec. ¶27. The limited protection of certain personal information allowed by Exemption 6 does not authorize DOD to withhold such information vital to the public's understanding of its conduct. To the contrary, FOIA's specific exemptions should be applied to promote public knowledge of the actions of government. Such knowledge is the "keystone" to government oversight, without which "'all other checks are insufficient.'" *Richmond Newspapers,* 448 U.S. at 569 (quoting 1 Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827).

3. Illuminating allegations of misconduct and abuse

There is still a further factor warranting disclosure of the information withheld by DOD from the Tribunal records. Allegations of misconduct and abuse of the detainees were raised during the hearings, Dodds Dec. ¶ 33 & Ex. L, and withholding identifying information inhibits the ability of the press and the public to evaluate these allegations as well. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

The authorities cited by DOD are not to the contrary and do not support its broad application of Exemption 6. In *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991), for example, the names of Haitian refuges interdicted and returned to Haiti were not required to be released because "[t]he addition of the redacted identifying information would not shed any additional light on the Government's conduct of its obligation." *Id.* at 178. The Court recognized that there was a public interest "in knowing whether the State Department has adequately monitored

Haiti's compliance with its promise not to prosecute returnees," but found this interest "adequately served" by disclosure of the interview summaries without specific names. *Id.* In that case the released portions of the summaries "inform the reader about the State Department's performance of its duty to monitor Haitian compliance," and knowledge of specific identities would not illuminate the conduct of the agency. *Id.*

By contrast, the redacted CSRT transcripts are not sufficient to "inform the reader" about DOD's performance in deciding whether or not to designate 558 Guantanamo Bay detainees enemy combatants, or to evaluate the propriety of its actions. Moreover, there was less public interest in knowing the names of the individuals returned to Haiti because they had not been arrested and were not being detained. Conversely, the privacy interest was greater in *Ray* because the interviews of the Haitians were conducted with a promise of confidentiality, something DOD does not contend it promised to the "enemy combatants" at Guantanamo.[11]

Similarly, in *Reporters Committee*, disclosure of the FBI's rap sheet regarding Charles Medico sought by a reporter "would not shed any light on the conduct of any Government agency or official." 489 U.S. at 773. While Medico allegedly had improper dealings with a corrupt Congressman and was an officer in a corporation with defense contracts, the Court concluded that the fact Medico had been arrested would "tell us nothing directly about the character of the *Congressman's* behavior . . . [n]or would it tell us anything about the conduct of the *Department of Defense*" in awarding contracts. *Id.* at 774 (emphasis in original). And, again, the public interest in *Reporters Committee* did not relate to the government's long-term incarceration of individuals. On the privacy side of the equation, the personal privacy interest

[11] The Court in *Ray* was also "unmoved" by the asserted public interest "in ascertaining the veracity of the interview reports," because there was "not a scintilla of evidence . . . that tends to impugn the integrity of the reports." 502 U.S. at 179. Here, however, there are clear indications of potential mistakes and misconduct.

was deemed to strong because, unlike the present case, the information sought was dated and not current. Comparing the circumstances in *Reporters Committee* with those in *Rose*,[12] the Court underscored the importance to the FOIA calculation of the passage of time: "[i]f a cadet has a privacy interest in past discipline that was once public but may have been 'wholly forgotten,' the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten." *Id.* at 769.

DOD's position gains no greater support from other authorities it cites, which turn on facts that are largely inapposite. For example, *Carter v. United States Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987), does not address whether it was proper for the Patent Office to redact the names of attorneys investigated for misconduct. *Id.* at 391. While upholding redaction of the names and addresses of the attorneys' clients, the court noted there could indeed be reason to disclose names "if there were grounds for suspecting a pattern of favoritism or bias in PTO proceedings." *Id.* at 394 n.20. Similarly, *Judicial Watch, Inc. v. Reno*, 2001 WL 1902811 (D.D.C. 2001), involved documents relating to the decision to return Elian Gonzales to his father's custody in Cuba. The court rejected as "nonsense" plaintiff's assertion that withheld biographical information would shed light on the government's rationale for raiding the home where Elian was being kept, *id.* at *7, and concluded that disclosure of private facts on an asylum application "reveals little or nothing about [the] agency's own conduct," particularly given that "the agency's asylum determination did not involve an evaluation of the application itself," *id.* at

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[12] *Rose* involved a FOIA request for summaries of honor board cases at the Air Force Academy. 425 U.S. at 358-60. The Supreme Court's decision did not discuss the public interest in knowing what the government is up to, addressing instead what information in a record might be considered private under FOIA. *Id.* at 380-81. Subsequently, in *Reporters Committee*, the Court stated that the deletions in *Rose* "were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code." 489 U.S. at 773.

*8 (citation omitted). *See also U.S. Dep't of Defense v. FLRA*, 510 U.S. at 497 (disclosure of names of agency employees to union would not further public's right to know what the government is up to).

Given that the information being withheld serves to shield knowledge of DOD's actions from the public, Exemption 6 is not properly invoked. This case is not about "making a news story more interesting." DOD Mem. at 24. It is about shedding light on the exercise of vast power by the Department of Defense, and on allegations of misconduct and abuse relating to the exercise of that power. DOD may not use the privacy protection provided by Exemption 6 to withhold information that reveals the functioning of government. *Reporters Committee*, 489 U.S. at 775.

D. At a Minimum, Exemption 6 Must be Applied More Narrowly and on a Case-by-Case Basis

DOD argues only that "some detainees have provided incriminating information," Hecker Dec. ¶9, yet it categorically withholds all names and identifying information from all Tribunal records, whether or not a specific transcript can reasonably be said to reveal any incriminating information that would create risk. Categorical decisions are appropriate only in circumstances where "a case fits into a genus in which the balance characteristically tips in one direction," *Reporters Committee*, 489 U.S. at 776, which is not true here. The potential danger of disclosing the identities of a detainee—the purported privacy interest here—is likely to vary depending on the contents of the transcripts and evidence provided to the Tribunal. Similarly, the balancing between the public and private interests of information such as a detainee's age, nationality or country of origin is likely to be different for different detainees. Even if the Court concludes that a privacy interest needs to be protected under Exemption 6, the balancing required should be done on a case-by-case basis, not categorically. *See, e.g., Ray*, 502 U.S. at 176 n.12 (disclosure of names and other identifying information not always a significant threat to privacy of named individuals); *Badhwar v. U.S. Dep't of the Air Force*, 829 F.2d 182, 185 (D.C. Cir. 1987) (Exemption 6 by its nature requires "a case-by-case evaluation").

In particular, the ages and nationalities of the detainees, which are among the information categorically withheld, are of particular interest to the public. From the observations of reporters, many detainees are minors. *See* Dodds Dec. ¶ 30 & Ex. K. The extent to which minors are being detained especially important issues about the government's conduct, and is itself newsworthy. *Id.*

Any invasion of privacy based on the mention of an unnamed detainees age or nationality would be merely speculative. "Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities," *Rose*, 425 U.S. at 380 n.19, and courts have distinguished cases in which particular pieces of information "would 'by themselves' identify a person, from one in which the requested information has the 'possibility' of supplying a 'missing link' in the chain of identification." *Norwood v. FAA*, 993 F.2d 570, 574-75 (6th Cir. 1993) (citation omitted). A detainee's age or country of origin would not "by themselves" identify a particular detainee. Nor are these pieces of information uniquely identifying.

All apart from other information being withheld, the ages and nationalities of detainess should be released.[13]

[13] The declarations submitted by DOD and a review of the documents produced also raise questions about the adequacy of DOD's search in this case. Some documents plainly are missing from the records disclosed. These include instances where written statements by detainees were submitted to the Tribunals but not turned over by DOD. Dodds Dec. ¶ 21 & Ex. G. DOD should be required to provide the apparently missing documents or explain their absence. *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 560 (S.D.N.Y. 1989); *Carney*, 19 F.3d at 812.

CONCLUSION

For each and all of the foregoing reasons, the Court should deny defendant's motion for summary judgment, and grant AP's motion for an order requiring defendant to provide information that has improperly been withheld under Exemption 6, and enter such other and further relief as to the Court seems proper.

Dated: July 13, 2005

Respectfully submitted,
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS,	X	**ECF CASE**
Plaintiff,	:	**Index No. 05 CV 3941**
- against -	:	**Judge Rakoff**
UNITED STATES DEPARTMENT OF DEFENSE,	:	**PROOF OF SERVICE**
Defendant.	X	

STATE OF NEW YORK)
) SS.
COUNTY OF NEW YORK)

SCOTT BAILEY, being duly sworn, deposes and says as follows:

1. I am a legal assistant with the law firm of Levine Sullivan Koch & Schulz, L.L.P. I am not a party to this action, am over 18 years of age, and reside in Brooklyn, New York.

2. On July 13, 2005, I served true copies of the Memorandum in Opposition to Defendant's Motion for Summary Judgment and the Declaration of Paisley Dodds by email transmission and Federal Express priority overnight courier upon:

Elizabeth Wolstein
U.S. Attorney – Civil Division
86 Chambers Street
New York, NY 10007
Elizabeth.Wolstein@usdoj.gov

Scott Bailey

Scott Bailey

Subscribed and sworn to before me
this 13th day of July, 2005

Lisamarie Appel

LISAMARIE APPEL
Notary Public, State of New York
No. 01AP4869703
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires Sept. 2, 2006